



No. 77-510

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF NEW MEXICO

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below-----	1
Jurisdiction -----	1
Question presented-----	1
Statutes involved-----	2
Statement -----	2
A. The Special Master's Report-----	3
B. The district court's decision-----	5
C. The decision of the New Mexico Supreme Court-----	6
Introduction and summary of argument-----	8
Argument -----	15
I. The United States enjoys reserved water rights in the Mimbres River to the extent necessary to fulfill the purposes of the Gila National For- est -----	15
II. This Court has previously held that the United States has reserved rights to the use of water in the Gila National Forest for each of the purposes asserted here-----	17
III. Maintenance of minimum instream flows for fire prevention, erosion control, and conservation of fish, game, and plantlife is among the purposes for which the national for- ests were created-----	22

(i)

Argument—Continued

A. Maintenance of minimum in-stream flows for protection against fire and erosion and for conservation of fish, game, and plantlife falls within the purpose of improving and protecting the forest	Page 24
1. The Organic Act of 1897 expressly provides that national forests can be established for the purpose of improving and protecting the forest	24
2. Maintenance of minimum flows in forest streams is necessary to protect the forest	28
3. Improving and protecting the forests was among the chief concerns of Congress in enacting the Organic Act of 1897	31
B. Maintenance of minimum in-stream flows also falls within the statutory purpose of securing favorable conditions of water flows	37
IV. Recreation and stockwatering are among the secondary purposes for which the Gila National Forest was created	40

Argument—Continued

A. Recreation is one of the purposes for which the national forests, and the Gila National Forest in particular, were created	Page 43
1. The legislative and administrative background	43
2. The state supreme court's "use" purpose" distinction	52
3. The Multiple-Use Sustained Yield Act of 1960	53
4. Substantial consumptive recreational use	56
B. The New Mexico Supreme Court erred by denying the United States reserved water rights for the purpose of stockwatering	57
1. Grazing has always been regarded as a secondary purpose of the Gila National Forest	59
2. Requiring federal permittees to acquire individual rights to water used by their stock on national forest land would place an unreasonable burden on federal range management	62

Conclusion	Page 64
Appendix	1A

CITATIONS

Cases:

<i>Arizona v. California</i> , 373 U.S. 546, decree entered, 376 U.S. 340.....	6, 10, 11, 15, 16, 17, 18, 20, 21
<i>Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation</i> , 402 U.S. 313	21
<i>Cappaert v. United States</i> , 426 U.S. 128.....	10, 15, 16, 17, 36, 53
<i>Colorado River Conservation District v. United States</i> , 424 U.S. 800.....	3
<i>Cromwell v. County of Sac</i> , 94 U.S. 351.....	21
<i>Federal Power Commission v. Oregon (Pelton Dam)</i> 349 U.S. 435.....	63
<i>Kleppe v. New Mexico</i> , 426 U.S. 529.....	62
<i>Light v. United States</i> , 220 U.S. 523.....	63
<i>Massachusetts Trustees v. United States</i> , 377 U.S. 235.....	52
<i>McMichael v. United States</i> , 355 F. 2d 283.....	63
<i>Power Reactor Co. v. Electricians</i> , 367 U.S. 396	51
<i>Saxbe v. Bustos</i> , 419 U.S. 65.....	52
<i>Skidmore v. Swift & Co.</i> , 323 U.S. 134.....	52
<i>Udall v. Tallman</i> , 380 U.S. 1.....	51
<i>United States v. District Court for Eagle County</i> , 401 U.S. 520.....	16, 17
<i>United States v. Gratiot</i> , 14 Pet. 526.....	63
<i>United States v. Grimaud</i> , 220 U.S. 506	27, 61, 63
<i>United States v. Hymans</i> , 463 F. 2d 615.....	63
<i>United States v. Powers</i> , 305 U.S. 527.....	15

Cases—Continued

<i>United States v. Rio Grande Dam & Irrigation Co.</i> , 174 U.S. 690.....	Page 63
<i>United States v. San Francisco</i> , 310 U.S. 16	62-63
<i>United States v. Zucca</i> , 351 U.S. 91.....	52
<i>Winters v. United States</i> , 207 U.S. 564....	15, 16
Constitution, statutes and regulation:	
United States Constitution, Article IV, Section 3, clause 2.....	62
Act of July 26, 1866, 14 Stat. 253, as amended, 30 U.S.C. 51.....	29
Act of July 9, 1870, 16 Stat. 218, as amended, 30 U.S.C. 52.....	29
Act of October 1, 1890, 26 Stat. 650.....	32
Section 2.....	32, 44
Appropriations Act of March 3, 1899, 30 Stat. 1095.....	48, 51
Appropriations Act of March 4, 1915, 38 Stat. 1101.....	49
Creative Act of March 3, 1891, 25 Stat. 1095 <i>et seq.</i>	24, 32
Section 24, 16 U.S.C. (1970 ed.) 471....	2, 1A
Department of Agriculture Appropriations Acts:	
Act of March 3, 1905, 33 Stat. 861, 873	48
Act of June 30, 1906, 34 Stat. 669, 683	48
Act of March 4, 1907, 34 Stat. 1256....	48
34 Stat. 1269.....	25, 48, 2A
34 Stat. 1270.....	48
Department of Justice Appropriations Act of 1953, Section 208, 66 Stat. 560, 43 U.S.C. 666 (McCarran Amendment)....	2

Constitution, statutes and regulations—Continued

Desert Land Act of 1877, 19 Stat. 377, as amended, 43 U.S.C. 321-----	Page 29
Federal Land Policy and Management Act of 1976, Pub. L. 94-579, 90 Stat. 2743---	9
Section 501-----	2A
Section 704(a)-----	8
Section 706(a)-----	25, 2A
Forest and Rangeland Renewable Resources Planning Act of 1974, Section 10(a), 88 Stat. 476, 16 U.S.C. (Supp. V) 1609(a), as amended by the National Forest Management Act of 1976, Pub. L. 94-588, 90 Stat. 2949, 2957-----	9
Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528-531---	2, 14, 53, 3A
16 U.S.C. 528-----	7, 53, 55
Organic Administration Act of June 4, 1897, 30 Stat. 11, as amended, 16 U.S.C. 473 <i>et seq.</i> -----	25, 1A
16 U.S.C. 473-----	9
16 U.S.C. 473-482-----	2
16 U.S.C. 475-----	6, 25, 34, 45, 63, 1A
16 U.S.C. 478-----	47
16 U.S.C. 481-----	29, 63, 3A
16 U.S.C. 551-----	2, 25, 28, 34, 45, 63, 1A
30 Stat. 908-----	50
33 Stat. 628, 16 U.S.C. 472-----	25, 2A
34 Stat. 3123-----	8, 27
34 Stat. 3126-----	8, 27, 50
34 Stat. 3274-----	8, 27
35 Stat. 2162-----	47
35 Stat. 2190-----	8
36 Stat. 2694-----	8
36 C.F.R. 231.6(a)-----	58

Miscellaneous:

American Law Institute, <i>Restatement of Judgments</i> (1942)-----	Page 21
Cameron, <i>The Development of Governmental Forest Control in the United States</i> (1972 ed.)-----	31
29 Cong. Rec. 1897):	
p. 2514-----	38
p. 2515-----	45
30 Cong. Rec. (1897):	
p. 900-----	34
p. 913-----	35
p. 914-----	35
p. 915-----	36, 39
p. 916-----	39, 46
p. 917-----	39, 46
p. 966-----	39, 59
p. 981-----	39
p. 982-----	39
p. 985-----	39
p. 1006-----	59
p. 1011-----	39, 59
Fernow, <i>Report of the Chief of the Division of Forestry for 1891</i> (1892)-----	33, 44
Fernow, <i>Report Upon the Forestry Investigations of the U.S. Department of Agriculture, 1877-1898</i> , H.R. Doc. No. 181, 55th Cong., 3d Sess. (1899)-----	31
Forbes, <i>Forestry Handbook</i> (1961)-----	58
<i>Forest Reserve Manual</i> (1902)-----	48
<i>Forest Service Atlas</i> (1907)-----	48
Forest Service, <i>Recreation Uses of the National Forests</i> (1918)-----	49
Forest Service, <i>The Use of the National Forest Reserves</i> (1905)-----	48, 61

Miscellaneous—Continued

	Page
Frome, <i>The Forest Service</i> (1971)-----	31, 58
Gates, <i>History of the Public Land Law Development</i> (1968)-----	31, 32, 34
Gila National Forest Recreation Management Plan (1964)-----	47
H.R. Rep. No. 1551, 86th Cong., 2d Sess. (1960)-----	54, 55
Hibbard, <i>A History of the Public Land Policies</i> (1939)-----	60-61
3 Hutchins, <i>Water Rights Laws in the Nineteen Western States</i> (1977)-----	29
Morreale, "Federal-State Rights and Relations," in 2 Clark, <i>Waters and Water Rights</i> (1967)-----	16
Pinchot, <i>Breaking New Ground</i> (1972 ed.)-----	34
Report of the Governor of New Mexico, H.R. Doc. No. 5, 58th Cong., 2d Sess. (1903)-----	61
Roberts, <i>Hoof Prints on Forest Ranges</i> (1963)-----	58, 59
S. Rep. No. 1407, 86th Cong., 2d Sess. (1960)-----	54, 55
Special Master's Report in <i>Arizona v. California</i> (December 5, 1960)-----	19, 20, 21
<i>Surveys of Forest Reserves</i> , S. Doc. No. 189, 55th Cong., 2d Sess. (1898)-----	60
Trelease, <i>Federal-State Relations in Water Law</i> (1971)-----	63
United States Forest Service, <i>Men Who Matched the Mountains: The Forest Service in the Southwest</i> (1972)-----	57

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OPINIONS BELOW

The opinion of the New Mexico Supreme Court (A. 234-241) is reported at 564 P. 2d 615. The order entered on June 4, 1976, in the District Court of the Sixth Judicial District in and for Luna County, New Mexico (A. 224-231), and the findings of fact and conclusions of law of its special master filed on May 5, 1975 (A. 190-199), are not reported.

JURISDICTION

The judgment of the New Mexico Supreme Court was entered on May 23, 1977 (A. 242). On August 11,

(1)

1977, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to October 3, 1977. The petition was filed on that date and granted on January 9, 1978 (A. 245). The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

Whether the United States is entitled under its reserved water rights to the use of water in the Gila National Forest for the maintenance of minimum in-stream flows, for recreation, and for stockwatering, on the ground that these were among the purposes for which the national forests were created.

STATUTES INVOLVED

Section 24 of the Act of March 3, 1891, 26 Stat. 1095, 1103, 16 U.S.C. (1970 ed.) 471 (since repealed); the relevant portions of the Organic Administration Act of June 4, 1897, 30 Stat. 11, 34-36, as amended, 16 U.S.C. 473-482, 551; and the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528-531, are set forth in the Appendix, *infra*, pp. 1A to 4A.

STATEMENT

The Rio Mimbres originates within the boundaries of the Gila National Forest in the mountains of southwestern New Mexico. It leaves the forest near the community of Mimbres and flows generally southward for about 50 miles. Near Deming, New Mexico, the river veers eastward for several miles and then disappears in a wide desert flat not far from the Mexican

border. This case concerns the rights to the waters of that river.

This action was instituted in 1966 in the District Court of the Sixth Judicial District of New Mexico as a suit among private parties to enjoin diversions of water from the Rio Mimbres. Various other private parties intervened in the suit until, in 1970, the State of New Mexico filed a complaint-in-intervention seeking a general adjudication of all water rights throughout the Mimbres stream system (A. 16-19). The State's complaint joined more than 900 parties as defendants, including the United States.¹

In its answer to the State's complaint, the United States invoked the federal law of reserved water rights and claimed entitlement to the use of the waters of the Rio Mimbres inside the national forest to the extent necessary "for the requirements and purposes" of the forest. The right to this water was reserved, the United States claimed, as of the dates that various tracts of public lands were withdrawn from the public domain for inclusion in the national forest (A. 27-29).

A. THE SPECIAL MASTER'S REPORT

In December 1970, the court appointed a special master to adjudicate the parties' claims. After receiv-

¹ The United States was joined pursuant to the McCarran Amendment, 43 U.S.C. 666. Originally enacted as Section 208 of the Department of Justice Appropriation Act of 1953, 66 Stat. 560, the McCarran Amendment gives consent to state court suits against the United States for the adjudication of water rights to a river system. See *Colorado River Conservation District v. United States*, 424 U.S. 800, 802-803, 807-809.

ing evidence and hearing argument, the special master on May 5, 1975, issued findings of fact and conclusions of law with respect to the water rights of the United States inside the national forest. The special master concluded that the United States enjoyed reserved rights to the waters of the Mimbres River System "for uses necessary for the requirements and purposes" of the national forest (A. 197). Those rights vested, he concluded, as of the dates that the various portions of the forest were withdrawn from the public domain (A. 197).

Specifically, the special master found that water of the Rio Mimbres was used within the forest for recreation, for stockwatering, and for fish and wildlife purposes, and that the priority dates for the water used for these purposes ranged from 1899 to 1910 (A. 192-193). With respect to the recreational uses, the special master concluded that "among the uses to which waters of the Mimbres River Stream System reserved for the Gila National Forest may properly be put are recreational uses incidental to hiking, fishing, camping and hunting"² (A. 198). He further concluded that the United States had reserved rights in the water for the maintenance of minimum instream flows on the Mimbres in the amount of two cubic feet per second at three places on the stream

² The special master also found, however, that "until the enactment of the Multiple Use-Sustained Yield Act on June 12, 1960 [citation omitted], no Act of Congress authorized the use of waters in national forests for substantial recreational reservoirs, winter sports facilities, and other such substantial works involving large consumptive uses" (A. 198).

system (A. 198). The United States had contended that maintenance of some minimal level of instream flow within the forest was necessary for fish preservation, erosion control, fire prevention, watershed protection, maintenance of natural flow downstream from the forest lands, wildlife habitat protection, and aesthetics (A. 88-89, 187, 205-207). Finally, the special master approved the use of reserved Mimbres water for stockwatering purposes by persons holding special use permits from the Forest Service, unless the permits specifically required that any water use be undertaken in compliance with state law (A. 198).

B. THE DISTRICT COURT'S DECISION

The State objected to the special master's report in several respects and submitted its objections to the district court. The State contended that the United States was not entitled to reserved water rights for the maintenance of minimum instream flows, for recreational uses of any kind, or for any stockwatering uses. On June 4, 1976, the state district court entered an order upholding the State's objections and modifying the special master's report accordingly (A. 224-231).

The district court concluded that the United States enjoyed no reserved water rights for any of the three disputed purposes, holding that these were not within "the purposes for which the Gila forest lands were or could have been withdrawn from the public domain" (A. 230-231). With regard to stockwatering, the district court further held that since the United States

enjoyed no reserved rights for that purpose, the Forest Service permittees who were allowed to graze livestock inside the forest would have to establish their own rights to the use of Mimbres water under state law (A. 230).

C. THE DECISION OF THE NEW MEXICO SUPREME COURT

The New Mexico Supreme Court affirmed the district court's decision, holding that the United States enjoyed no reserved rights to the waters of the Mimbres for the purposes of recreation, stockwatering, or the maintenance of minimum instream flows (A. 234-241). The court acknowledged that the issue was governed by the federal law of reserved water rights and by this Court's holding in *Arizona v. California*, 373 U.S. 546, 601, that the United States "intended to reserve water sufficient for future requirements of * * * the Gila National Forest" (A. 235-236). But the court held that the purposes for which the United States was claiming reserved water rights were not among the purposes for which the Gila National Forest was created.

In defining the purposes for which the Forest was created, the New Mexico Supreme Court looked to a portion of the Organic Administration Act of 1897, 30 Stat. 34, as amended, 16 U.S.C. 475 (Organic Act), which contained the first statutory statement of standards for the creation, management, and use of the national forest system. Initially, the court noted that the Organic Act provided that national forests could be created for three express purposes: "1) improving

and protecting the forest; 2) securing favorable conditions of water flows; and 3) furnishing a continuous supply of timber" (A. 238). Later in its opinion, however, the court declared that the Act authorized the establishment of the Gila National Forest for only two purposes: "to insure favorable conditions of water flow and to furnish a continuous supply of timber" (A. 241).

Construing the two remaining purposes, the court held that they did not encompass any of the purposes claimed by the United States. The court distinguished between the "purposes" for which the national forests were created and the "uses" to which Congress contemplated that they would be put, and reasoned that if any of the three "secondary uses" proposed by the United States conflicted with the "primary purposes" identified by the court, the "secondary uses" would not be permitted to continue (A. 238-239). The court thus concluded that the "uses" for which the United States claimed reserved water rights were not within the "purposes" for which a national forest could be established (A. 239).

The court found support for its position in the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528, which declares it the policy of Congress that the national forests are established and shall be administered "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes" (A. 239). Noting that this statement of purposes was made only in 1960, and that the purposes were declared to be "supplemental to, but not in derogation of," the

purposes for which the national forests initially were established, the court concluded that the 1960 Congress did not envision these purposes as having been encompassed by the Organic Act of 1897 (A. 240).

Accordingly, the New Mexico Supreme Court held that "[r]ecreational purposes and minimum instream flows were not contemplated" as among the purposes for which the Gila National Forest was created, and that the United States therefore enjoyed no reserved water rights for these purposes (A. 241). The court reached the same conclusion with respect to stock-watering and therefore held that Forest Service permittees must obtain their water rights under state law (A. 241).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Gila National Forest was established by Presidential proclamation in 1899 and enlarged by subsequent proclamations in 1905, 1907, 1908, and 1910.^{2a} Portions of other national forests were subsequently transferred to the Gila, so that at present the Gila National Forest encompasses roughly three million acres of mountainous timberland in southwestern New Mexico.

The Gila is one of the 154 national forests, most of which are located in the Western States. In 1891, Congress authorized the President to create national forests by withdrawing lands from the public domain,³

^{2a} 34 Stat. 3123, 3126, 3274; 35 Stat. 2190; 36 Stat. 2694.

³ Section 24 of the Act of March 3, 1891, 26 Stat. 1095, 1103, 16 U.S.C. (1970 ed.) 471 (Creative Act), repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. 94-579, 90 Stat. 2743, 2792.

and in 1897, Congress gave the President the authority to modify or reduce the amount of public land reserved as national forests.⁴ By virtue of the Federal Land Policy and Management Act of 1976, Pub. L. 94-579, 90 Stat. 2792, however, the President is now forbidden from withdrawing any part of the public domain to enlarge the inventory of the National Forest System, and by virtue of the Forest and Rangeland Renewable Resources Planning Act of 1974,⁵ he is also forbidden from returning any national forest lands to the public domain. In consequence, the enlargement or reduction of public acreage in the National Forest System can now be accomplished only by an Act of Congress. The National Forest System presently comprises 153,909,368 acres previously withdrawn from the public domain.

Since the time of the establishment of the Gila National Forest, the stream system of the Rio Mimbres has provided water to a substantial portion of the forest for a variety of purposes. Mimbres water has been used for recreational purposes such as hunting, fishing, and camping; it has been used to provide water for the livestock permitted to graze in the forest; and it has been used for small-scale conservation projects such as fish ponds and hatcheries (A. 60, 89-90, 99, 114).

⁴ Organic Administration Act of June 4, 1897, 30 Stat. 11, 36, 16 U.S.C. 473.

⁵ Section 10(a) of the Forest and Rangeland Renewable Resource Planning Act of 1974, 88 Stat. 476, 480, 16 U.S.C. (Supp. V), 1609(a), as amended by the National Forest Management Act of 1976, Pub. L. 94-588, 90 Stat. 2949, 2957.

The ruling of the New Mexico Supreme Court in this case has put these uses in jeopardy. While recognizing the diverse purposes served by the forest, the New Mexico Supreme Court held that recreation, stockwatering, and maintenance of minimum instream flows were not among the purposes for which the national forests were created. The court therefore ruled that the United States has no reserved rights in the waters of the Mimbres for any of these purposes. Unless the court's decision is overturned, the Gila National Forest will be assured water for these purposes only to the extent that the individual users can assert and perfect their interests under the state law of prior appropriation or to the extent that the United States acquires rights in the water through exercise of its power of eminent domain.

I

The general legal principles applicable to this case are not in dispute; as the state supreme court recognized, the case is governed by the federal law of reserved water rights. Under that doctrine, when the United States withdraws land from the public domain for a federal purpose, it is deemed to have reserved at that time a sufficient quantity of the appurtenant unappropriated water to fulfill the purposes of the reservation. *Cappaert v. United States*, 426 U.S. 128, 138-139. The doctrine applies to federal enclaves of all kinds, including Indian reservations, national parks, and national forests. *Arizona v. California*, 373 U.S. 546, 601. The question here, thus, is whether

the purposes for which the federal government created the Gila National Forest included the purposes of recreation, grazing, and maintenance of minimum flows in the forest streams, so that a reserved right of the United States to water for those purposes will be recognized.

II

In *Arizona v. California, supra*, the Master expressly found that recreation, grazing, and protection of the watershed were among the purposes of the Gila National Forest for which the United States was entitled to reserved water. Although the Court did not restate these specific findings, it approved the Master's conclusion that the United States had reserved rights to water in quantities necessary to fulfill the purposes of the Gila National Forest, and it entered a decree, tracking the terms of the Master's proposed decree, that adjudicated to the United States reserved water rights for the purposes of the Gila National Forest. The decree in *Arizona v. California* constitutes a prior adjudication holding that recreation, grazing, and watershed protection are among the purposes for which the United States is entitled to reserved water rights in the Gila National Forest. Since New Mexico and the United States were parties to that case, under the principles of collateral estoppel New Mexico is bound by that adjudication here.

III

The holding of the New Mexico Supreme Court that the United States has no reserved right to maintain

minimum flows in the streams of the Rio Mimbres within the National Forest is at war with the express terms and the legislative background of the governing statutes, including the Creative Act of 1891 and the ~~Organic~~ ^{Organic} Act of 1897.

The Organic Act provides that a national forest can be established for any of three purposes: (1) to improve and protect the forest; (2) to secure favorable conditions of water flows; or (3) to furnish a continuous supply of timber. The United States argued below that it needed to be assured of minimum instream flows on the Mimbres for a variety of purposes, including fire and erosion prevention, fish and wildlife conservation, watershed protection, and maintenance of natural flow downstream. These purposes fit squarely within both of the first two purposes set out in the Organic Act. A stream flow of at least some minimum volume protects the forest by preventing fire and erosion, by providing water for the wildlife and fish, and by preserving the watershed. Maintenance of instream flows is also within the meaning of "securing favorable conditions of water flows." In addition, the provisions of the Organic Act directing the Secretary of the Interior (subsequently the Secretary of Agriculture) to preserve the national forests from destruction, and authorizing him to regulate their occupancy and use, further indicate a congressional intention to safeguard the forests from the kinds of injury that can result from deprivation of their natural streamflows.

The background and legislative history of the Organic Act confirm that maintenance of minimum in-

stream flows was within the purposes for which the creation of national forests was authorized. By enactment of the Organic Act and its predecessor statutes in the 1890's, Congress sought to stem the destruction and uncontrolled exploitation of publicly owned forests; at the same time, Congress appreciated the beneficial effects of mountain forests in regulating the flow of water in streams and rivers. The legislative materials, as well as the statutory language, compel the inference that Congress intended to reserve sufficient water to maintain minimum levels of flow in the streams within the national forests.

IV

While recreation and stockwatering were not among the primary purposes for which the Organic Act authorized the creation of national forests, the legislative and administrative record prior to and immediately following passage of the Act establishes that they were among the secondary objects that Congress intended the national forests to serve. The New Mexico Supreme Court, construing the Organic Act narrowly, concluded that any purpose not expressly stated in that Act was not a legitimate purpose of a national forest. But the legislative and administrative background demonstrates that the Organic Act was not meant to restrict national forests to the specific purposes listed in the Act, but only to provide that a national forest could not be created unless one of the statutory purposes was present. Moreover, one reason for the statutory purpose of "protect[ing] the

forest" was to preserve it for recreational enjoyment. Administrative and legislative actions make it clear that recreation and stockwatering were regarded as legitimate, if secondary, purposes of the national forests from the time of the Organic Act and earlier. In 1899, the year that the Gila National Forest was first established, Congress passed laws designed to facilitate tourism in the national forests and to protect their fish and game.

This interpretation of the Organic Act was confirmed when Congress passed the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528-531. That Act explicitly reaffirmed the various purposes served by the national forests, including watershed protection, recreation, and grazing, but adhered to the Organic Act in providing that while a national forest could be created in part to serve any of these purposes, it could not be created unless one of the three primary purposes set forth in the Organic Act was present.

Finally, the decision of the New Mexico Supreme Court would interfere with a longstanding federal program of range management in the national forests, which is administered through a system of grazing permits issued by the Forest Service. In carrying out its statutory mandate to regulate the occupancy and use of the national forests, the Forest Service employs a grazing permit program that depends in part on its ability to control and allot stockwatering rights to its permittees. The state court's ruling denying the United States any right to reserved water for stock-

watering purposes in the national forest, and requiring Forest Service permit holders to obtain their water rights individually under state law, would impair the effectiveness of the federal grazing permit system, thus placing an unreasonable burden on federal range management and interfering with federal control of federal lands.

ARGUMENT

I. THE UNITED STATES ENJOYS RESERVED WATER RIGHTS IN THE MIMBRES RIVER TO THE EXTENT NECESSARY TO FULFILL THE PURPOSES OF THE GILA NATIONAL FOREST.

It is well settled that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138; accord, *Arizona v. California*, 373 U.S. 546, 597-602; *United States v. Powers*, 305 U.S. 527, 528; *Winters v. United States*, 207 U.S. 564, 575-578. Because the federal right applies only to waters that are unappropriated at the time the public land is reserved, it is subordinate to rights perfected before the establishment of the federal enclave. But it is superior, in turn, to rights perfected after that date. "[T]he United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators." *Cappaert v. United States*, *supra*, 426

U.S. at 138; *Arizona v. California, supra*, 373 U.S. at 600; see also Morreale, "Federal-State Rights and Relations", in 2 Clark, *Waters and Water Rights* 58-71 (1967).

The doctrine of reserved water rights was first clearly stated in *Winters v. United States*, 207 U.S. 564. The question there was whether the creation of the Fort Belknap Indian Reservation carried with it the implied reservation of a sufficient amount of water from the Milk River for irrigation purposes. After concluding that the purpose of creating the Reservation was to convert the Gros Ventre and Assiniboin Indians from a nomadic into a pastoral people, the Court held that the creation of the Reservation established an implied right to sufficient water to fulfill that purpose by permitting the Indians to irrigate their land.

The doctrine is not limited to Indian reservations but applies to any federal enclave, including national parks and national forests. *United States v. District Court for Eagle County*, 401 U.S. 520, 522-523; see *Cappaert v. United States, supra*, 426 U.S. at 138. In *Arizona v. California, supra*, this Court held that the doctrine applies to the very national forest involved in this case. The Court stated (373 U.S. at 601):

The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water suffi-

cient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

Since the doctrine is based on the need for the water to satisfy the purposes of the federal enclave, the amount of water reserved is the amount "sufficient to accomplish the purposes of the reservation." *Cappaert v. United States, supra*, 426 U.S. at 139. That much is reserved, and "no more." *Id.* at 141. Determination of the amount involves consideration, however, of "the future as well as the present needs" of the reservation. *Arizona v. California, supra*, 373 U.S. at 600. In sum, as this Court stated in *United States v. District Court for Eagle County, supra*, 401 U.S. at 523, "[t]he reservation of waters may be only implied and the amount will reflect the nature of the federal enclave."

In this case, then, the United States enjoys reserved rights in the waters of the Rio Mimbres within the Gila National Forest to the extent that the water is necessary to fulfill the purposes of the Forest. The question is what those purposes are.

II. THIS COURT HAS PREVIOUSLY HELD THAT THE UNITED STATES HAS RESERVED RIGHTS TO THE USE OF WATER IN THE GILA NATIONAL FOREST FOR EACH OF THE PURPOSES ASSERTED HERE

In contrast to the New Mexico Supreme Court's narrow view of the purposes of the national forests,

this Court has previously recognized that the United States has reserved rights to water in national forests, and in the Gila National Forest in particular, for a variety of purposes that include all those at issue in this case.

In *Arizona v. California*, 373 U.S. 546, decree entered, 376 U.S. 340, the Court decreed that the United States had the right to divert water from the Gila and San Francisco Rivers in the Gila National Forest "in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the forest within which the water is used" (376 U.S. at 350). The New Mexico Supreme Court treated this portion of the Court's decree as leaving open the questions "for what purpose the Gila National Forest was originally established and whether those purposes necessarily require an implied reservation of water" (A. 237). But examination of this Court's opinion, its decree, and the Master's Report demonstrates that both questions were decided in *Arizona v. California*.

The first question—"for what purpose the Gila National Forest was originally established"—was squarely decided by the Master. He found that the 11 National Forests in the Lower Colorado River Basin, which include the Gila National Forest, were established for the following purposes:

- (1) the protection of watershed and the maintenance of natural flow in streams below the sheds; (2) production of timber; (3) produc-

tion of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public.

Special Master's Report in *Arizona v. California*, p. 96 (December 5, 1960).

The second question—"whether those purposes necessarily require an implied reservation of water"—was answered by the Master's finding that:

In withdrawing lands for the Gila National Forest the United States intended to reserve rights to the use of so much water from the Gila and San Francisco Rivers as might be reasonably needed to fulfill the purposes of the Forest.

[Master's Report *supra*, at 342.]

This finding, and its accompanying conclusion of law (*id.* at 343),⁶ were approved in this Court's opinion⁷ and incorporated in the portion of its decree quoted above (376 U.S. at 350).

New Mexico contends (see Brief in Opposition to Petition for Certiorari, at 15) that the question of the purposes of the Gila National Forest remains open

⁶ The conclusion of law, which in turn was made a part of the Master's recommended decree and subsequently adopted by this Court, read as follows:

"The United States has the right to divert water from the mainstream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the Forest within which the water is used." Master's Report, *supra*, at 343. See also *id.* at 358 (recommended decree); 376 U.S. 340, 350 (final decree).

⁷ "We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of * * * the Gila National Forest." 373 U.S. at 601.

because it was not decided "specifically" by the Court in *Arizona v. California*, but only by the Master. While this Court did not reiterate the Master's finding with regard to the purposes of the Forest, that finding was an essential predicate of the Court's decree. If the purposes of the national forests at issue in *Arizona v. California* were not determined in that case, this Court's decree did no more than restate the bare legal proposition that the United States is entitled to reserved water rights to the extent of the purposes of the federal enclave, whatever those purposes may be. On that view of the decision in *Arizona v. California*, this Court left the claim of the United States to reserved rights in the Gila and San Francisco Rivers for the Gila National Forest open to complete relitigation, in a state or federal court, on the assertion that the purposes of the Forest were not as broad as the Master found and do not, after all, confer any reserved rights.

We submit that the Court in *Arizona v. California* did more than that. It meant to, and did, adjudicate the rights of the United States to take water from the Gila and San Francisco Rivers for the purposes of the Gila National Forest. In doing this, it necessarily based its decree on the Master's finding of what the purposes of the Gila National Forest were.⁹ For it was that finding that gave content to the Master's conclu-

⁹ Master's Report, *supra*, at 96 (quoted at pp. 18-19, *supra*). The Master made a further finding that "the future water requirements of the Gila National Forest appear to be so modest that it is unnecessary to put maximum limits on the reserved water rights created for its benefit." *Id.* at 335.

sion—specifically adopted by the Court—that the United States was entitled to divert water "in quantities reasonably necessary to fulfill the purposes of the Gila National Forest" (376 U.S. at 350; Master's Report, *supra*, at 343, 357-358).

Accordingly, under the principles of collateral estoppel, since the issue was litigated and determined by a valid final judgment and since the determination was essential to the judgment, New Mexico is bound by the determination in *Arizona v. California* of the purposes for which the Gila National Forest was established.¹⁰ See American Law Institute, *Restatement of Judgments* § 68 (1942).¹¹ But even if this were not the case, that determination is persuasive

⁹ New Mexico was a party to *Arizona v. California*, as was the United States. See 373 U.S. at 551 and n. 3; 350 U.S. 114.

¹⁰ New Mexico argues (Brief in Opposition to Petition for Certiorari, at 14) that it should not be bound by the determination because the Master's finding was not supported by the evidence. This claim comes too late; a determination made against a party in a prior action cannot be challenged on the ground that it was incorrect. *Blender-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329; *Cromwell v. County of Sac*, 94 U.S. 351.

New Mexico also relies (Brief in Opposition to Petition for Certiorari, at 14) on the Court's statement, at the end of its opinion in *Arizona v. California*, *supra*, 373 U.S. at 602, that it had disagreed with the Master on some points and not ruled on others and that it would therefore entertain submissions from the parties regarding the form of the final decree. However, the Court expressly stated in its opinion that it agreed with the Master on the question of reserved rights for the Gila National Forest, 373 U.S. at 601, and it adopted that portion of the Master's recommended decree *verbatim*. Compare Master's Report, *supra*, at 357-358, with *Arizona v. California*, *supra*, 376 U.S. at 350.

and, for the reasons discussed in the remainder of this brief, it is correct.

III. MAINTENANCE OF MINIMUM INSTREAM FLOWS FOR FIRE PREVENTION, EROSION CONTROL, AND CONSERVATION OF FISH, GAME, AND PLANTLIFE IS AMONG THE PURPOSES FOR WHICH THE NATIONAL FORESTS WERE CREATED

In the proceedings below, the United States claimed a reserved right in the waters of the Mimbres sufficient to maintain minimum instream flows for a variety of purposes. Before the special master, the United States presented evidence that maintenance of minimum instream flows was necessary for fish preservation, and particularly for preservation of the Gila trout, a rare and endangered species native only to the Gila National Forest (A. 88-90). The United States argued that maintenance of minimum instream flows served other valid forest purposes as well, such as erosion control, fire prevention, watershed protection, maintenance of natural flow downstream from the forest lands, wildlife habitat protection, and aesthetics (A. 187); and the special master stated that he could take judicial notice of these purposes (A. 205-206).¹¹ The master awarded the United States the right to maintain a minimum nonconsumptive instream flow of two cubic feet per second at three

¹¹ The special master made this statement at an untranscribed hearing on March 6, 1975 (see A. 171-173). Reference to his statement appears in a pleading filed by the United States in the state district court (A. 205-206). The accuracy of that reference was not disputed by the State.

points on the Mimbres stream system within the national forest, listing the purpose as "fish" (A. 192-193, 198).

Before the special master's report was issued, the United States requested that the proposed findings be reworded to make it clear that the minimum instream flows would serve not only "fish" purposes but also the purposes of watershed protection and the maintenance of natural downstream flows, and to indicate that they "would also produce other equally valid results such as improved fish and wildlife habitat, fire and erosion protection, aesthetics, recreation, etc." (A. 187). After the master declined to reword the findings, the same request was made to the state district court (A. 200-207). Alternatively, the United States requested leave from the court to submit additional evidence on the need for minimum instream flows (A. 219). The district court, however, overturned the special master's decision altogether, ruling that the United States had no reserved rights to minimum instream flows for any purpose "for which the Gila forest lands were or could have been withdrawn from the public domain" (A. 231).

In the New Mexico Supreme Court, the United States again pressed its view that the maintenance of minimum instream flows was necessary not only for "fish" purposes but also for the purposes of "erosion control, fire protection, watershed protection, wildlife habitat protection and aesthetics" (Brief for the United States on appeal to the New Mexico Supreme Court, at 14). The supreme court adverted to the

argument that minimum instream flows were necessary for a variety of purposes, including the "fish" purposes explicitly recognized in the special master's report, but it held that these objectives, however laudable, did not "come within the original intent of Congress when creating national forests" (A. 238). "[M]inimum instream flows were not contemplated," the court held (A. 241). Accordingly, the court affirmed the decision of the state district court holding that the United States had no reserved rights to water for maintenance of minimum instream flows for any purpose.

We submit that this ruling is erroneous in light of both the express purposes for which the creation of national forests was authorized and the legislative history of the statutes creating and providing for the management of the national forest system.

A. MAINTENANCE OF MINIMUM INSTREAM FLOWS FOR PROTECTION AGAINST FIRE AND EROSION AND FOR CONSERVATION OF FISH, GAME, AND PLANTLIFE FALLS WITHIN THE PURPOSE OF IMPROVING AND PROTECTING THE FOREST

1. *The Organic Act of 1897 expressly provides that national forests can be established for the purpose of improving and protecting the forest*

Although Congress provided for the creation of a national forest system in the "Creative Act" of March 3, 1891 (26 Stat. 1095, 1103), it supplied no guidance at that time concerning the purposes or uses of the forest reservations or the ways they should be managed. The first congressional answer to these questions

was provided in the "Organic Administration Act" of June 4, 1897 (30 Stat. 11, 34-35). The decision of the New Mexico Supreme Court in this case turned on the court's construction of that Act.

The Organic Act provides, in pertinent part (30 Stat. 35):¹²

No national forest shall be established except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of [the Creative Act of 1891], to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the [Creative Act of 1891] and which may be continued; and he may make such rules and regulations and establish such service as

¹² The quoted paragraphs from the Organic Act are codified, as amended, in 16 U.S.C. 475 and 551. Section 551 was amended in 1905, when Congress transferred control of the forest reserves from the Secretary of the Interior to the Secretary of Agriculture. 33 Stat. 628, 16 U.S.C. 472. In 1907, Congress redesignated the "forest reservations" as "national forests." 34 Stat. 1269. And in 1976, Section 551 was repealed insofar as it applied "to the issuance of rights of way over, upon, under, and through * * * lands of the National Forest System." Pub. L. 94-579, 90 Stat. 2793.

will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forest thereon from destruction * * *.

The state court's interpretation of this statute was flawed in several respects. The court disregarded the first of the three express purposes for which the statute provided that national forests could be created, "to improve and protect the forest." The court wrongly held, without discussion, that maintenance of minimum instream flows was outside the scope of the second express statutory purpose, "securing favorable conditions of water flows." The court incorrectly dismissed the second paragraph of the Act as only reflecting permissible "uses" of the national forests and not relating to the "purposes" set out in the preceding paragraph. And the court wrongly interpreted the Act as precluding supplemental purposes rather than simply requiring that one of the stated purposes be present to justify the creation of a national forest.

The New Mexico Supreme Court initially recognized that the Organic Act states three purposes for which a national forest may be created (A. 238):

The Act limits the purposes for which national forests are authorized to: 1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber.

The court did not suggest—nor has the State—that the purposes for which the Gila National Forest was

created were in any way narrower than the purposes for which the Organic Act stated that national forests generally could be established.¹³ Yet later in its opinion, without any explanation, the court reduced the three statutory purposes to two (A. 241):

We thus conclude that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber.

The purpose of "improving and protecting the forest" had been discarded.

Dismissal of the first statutory purpose was error. The language of the Act leaves no doubt that "to improve and protect the forest" is an independent purpose, and this Court has recognized it as such. In *United States v. Grimaud*, 220 U.S. 506, 515, in the course of discussing the Organic Act, the Court stated that the "forest reservations * * * were intended 'to improve and protect the forest and to secure favorable conditions of water flows.'"

¹³ No such suggestion would be tenable, since the Presidential proclamations creating and expanding the Gila National Forest provide no support for any such limitation. In the first of those proclamations (34 Stat. 3126), President McKinley created the Gila National Forest, under the name Gila River Forest Reservation, stating only that the lands included in the Forest were "in part covered with timber" and that it appeared "that the public good would be promoted by setting apart and reserving said lands as a public reservation." Subsequent proclamations expanding the Forest (34 Stat. 3123, 3274) used identical language, which was the standard formula for a proclamation creating a national forest at that time.

Further textual support for the purpose of protecting the forest is provided by the second paragraph of the Organic Act quoted above (pp. 25-26, *supra*). That paragraph (codified as 16 U.S.C. 551) requires the Secretary of the Interior to provide against "destruction by fire and depredations upon the public forests" and authorizes him to make rules and establish services to "insure the objects of such reservations, namely, * * * to preserve the forests thereon from destruction * * *." It thus confirms that conservation was among the basic purposes for which the national forests were established, and it underscores the importance of the Organic Act's first stated purpose: "to improve and protect the forest."

The New Mexico Supreme Court gave only passing attention to the second paragraph, regarding it not as an expression of the "purposes" of the national forests but only as an instrument for regulating their "uses" (A. 238-239). But the provision reflects directly on the purposes set out in the immediately preceding paragraph. It specifically refers to "the objects of such reservations," which are stated to include preservation of the forests from destruction, and by directing the Secretary to provide against "destruction by fire and depredations upon the public forests" it seeks to implement the stated congressional purpose "to improve and protect the forest."

2. Maintenance of minimum flows in forest streams is necessary to protect the forest

Assuring the availability of minimum flows in the forest streams is well within the meaning of "improv-

[ing] and protect[ing] the forest." Such flows serve, among other things, to protect against fire and erosion and dessication of the watershed. Moreover, since the "forest" consists not only of timber but of the fish, game, and plantlife that are also part of the sylvan ecology, minimum stream flows serve to improve and protect the forest by contributing to the conservation of all these living things.

The need is not academic, nor the danger unreal. New Mexico, like most of the Western States, has adopted the doctrine of prior appropriation as the touchstone of its water rights law, instead of the common law doctrine of riparian rights that prevails in the more humid Eastern States. See 3 Hutchins, *Water Rights Laws in the Nineteen Western States* 390 (1977). A series of earlier federal statutes, including the Desert Land Act of 1877, 19 Stat. 377, as amended, 43 U.S.C. 321, had deferred to state law to govern the private use of water found on public lands,¹⁴ and in the Organic Act of 1897 this concept was applied, in part, to lands withdrawn for the establishment of national forests. The pertinent provision states (30 Stat. 36, 16 U.S.C. 481):

All waters within the boundaries of national forests may be used for domestic, mining, milling or irrigation purposes, under the laws of the States wherein such national forests are

¹⁴ The same concept had been embodied in various statutes governing mining on public lands. See Act of July 26, 1866, 14 Stat. 253, as amended, 30 U.S.C. 51; Act of July 9, 1870, 16 Stat. 218, as amended, 30 U.S.C. 52.

situated, or under the laws of the United States and the rules and regulations thereunder.

Under this statutory authority, private appropriators have long been permitted to remove water from national forest lands for private purposes, including substantial uses such as those involved in mining and irrigation. If private appropriators remove a substantial volume of water from streams in the upper reaches of the national forest—especially a relatively small stream in a generally arid area, like the Mimbres—the instream flow in the forest below can be reduced to the point of injuring the land and life of the forest. This case is one of a number of pending water rights cases, involving at least 17 other national forests, in which the United States has asserted a reserved right to insist on the maintenance of minimum flows in forest streams for purposes such as fire and erosion prevention, wildlife habitat protection, and preservation of natural flow in the watershed.¹⁵ These purposes, we submit, serve the ultimate purpose of “improv[ing] and protect[ing] the forest” within the meaning of the Organic Act.

¹⁵ The cases of *United States v. Adair*, D. Ore., Civil No. 75-914, *United States v. Truckee-Carson Irrigation District*, D. Nev., Civil No. R-2897 JBA, *United States v. Tongue River Water Users Ass'n.*, D. Mont., Civil No. CV-75-20-Blg, and *State of New Mexico ex rel. Reynolds v. MolyCorp*, D. N.M., Civil No. 9780, are pending in federal district courts. The case of *Avondale Irrigation Dist. v. North Idaho Properties, Inc.*, No. 22418, is pending in the Supreme Court of Idaho. And general water rights adjudications are pending in state courts in Colorado, Wyoming, and Montana.

3. *Improving and protecting the forests was among the chief concerns of Congress in enacting the Organic Act of 1897*

The legislative history of the Organic Act supports the view that protection against fire and erosion and conservation of the land and life of the forest were contemplated as being within the statutory purpose “to improve and protect the forest.”

The national forest system was first established in the 1890's through a series of legislative enactments and Presidential proclamations. The impetus for the creation of national forest reserves had come from the conservation movement of the late nineteenth century, which had sparked public alarm over the depletion of forests in the Northeast and Great Lakes States. Throughout this period, concern over the diminishing forest reserves was combined with recognition of the importance of forest cover in preventing floods and with a growing interest in the forests' recreational and aesthetic values. See Fernow, *Report Upon the Forestry Investigations of the U.S. Department of Agriculture, 1877-1898*, H.R. Doc. No. 181, 55th Cong., 3d Sess. 168-191 (1899); Frome, *The Forest Service* 3-5 (1971); Gates, *History of Public Land Law Development* 563 (1968).

Responding to the appeals of conservationists such as Carl Schurz and a growing corps of professional foresters, Congress in the early 1890's acted to protect the forests situated on the nation's public lands. See Cameron, *The Development of Governmental Forest Control in the United States* 204-205 (1972 ed.). In 1890, Congress created the first national forest when it

set aside certain public lands in California as "reserved forest lands." Act of October 1, 1890, 26 Stat. 650, 651. Section 2 of that Act placed the lands under the control of the Secretary of the Interior, who was assigned the duty of promulgating rules and regulations for their care and management. These regulations, the Act stated, "shall provide for the preservation from injury of all timber, mineral deposits, natural curiosities, or wonders within said reservation, and their retention in their natural condition." 26 Stat. 651. The Act further instructed the Secretary to "provide against the wanton destruction" of the fish and game inside the reservation, "and against their capture or destruction, for the purposes of merchandise or profit," and to take "all such measures as shall be necessary or proper to fully carry out the objects and purposes of this act." *Ibid.*

Less than a year later, Congress provided for the systematic extension of the concept of national forests that had begun with the 1890 legislation. In the Creative Act of 1891 (26 Stat. 1095, 1103), Congress gave the President general authority to establish national forests, or "forest reservations," by reserving public lands that were "wholly or in part covered with timber or undergrowth, whether of commercial value or not." The major force behind the enactment of the Creative Act was Bernard E. Fernow, the chief of the Forestry Division of the Department of Agriculture between 1885 and 1898. Gates, *supra*, at 565. At the time the Creative Act was passed, Fernow outlined

the purposes behind the creation of the forest reservations in his *Report of the Chief of the Division of Forestry for 1891*, p. 224 (1892):

These are first and foremost of economic importance, not only for the present but more specially for the future prosperity of the people residing near such reservations, namely, first, to assure a continuous forest cover of the soil on mountain slopes and crests for the purpose of preserving or equalizing waterflow in the streams which are to serve for purposes of irrigation, and to prevent formation of torrents and soil washing; second, to assure a continuous supply of wood material from the timbered areas by cutting judiciously and with a view to reproduction. Secondary objects, such as can and will be subserved at the same time with those first cited, are those of an aesthetic nature, namely, to preserve natural scenery, remarkable objects of interest, and to secure places of retreat for those in quest of health, recreation, and pleasure. * * *

All the purposes of the Creative Act, Fernow said, could be achieved by proper forest management through "[r]egulation of the occupancy and the use of the reservation" (*id.* at 226). While emphasizing that "the multiplication of national parks in remote and picturesque regions was not the intent of the law," Fernow noted that the reservations were specifically designed to prevent fire and useless destruction of public property, to provide revenue from the sale of forest products, and "altogether to administer this

valuable and much-endangered resource for present and future benefit" (*id.* at 224).

Although the Creative Act provided for the establishment of national forests, it supplied no guidance as to how the resources of those forests would be managed and used. Efforts continued in Congress to pass more specific legislation, and the Organic Act of 1897 was the result.

The Organic Act was proposed by Senator Pettigrew of South Dakota (30 Cong. Rec. 900 (1897)) as an amendment to a general appropriations bill, and it was intended to serve several functions. See Gates, *supra*, at 569-572; Pinchot, *Breaking New Ground* 113-118 (1972 ed.). First, the Pettigrew Amendment suspended the implementation of an unpopular series of forest-reserve proclamations issued by President Cleveland in the last days of his second administration. Second, the amendment authorized future Presidents to return forest reserve land to the public domain or otherwise modify prior Presidential proclamations withdrawing public lands for forest purposes. Finally, the Pettigrew Amendment addressed the questions left unanswered by the Creative Act by setting out more definite legislative standards for creating, utilizing, and managing the forests. The pertinent portions of the Pettigrew Amendment were enacted without modification and have been codified as 16 U.S.C. 475 and 551 (quoted at pp. 25-26, *supra*).

The congressional debates on the Pettigrew Amendment focused on the objective of opening the forest

resources to public use while providing an orderly scheme for protecting the forest cover from destruction. That the congressional purposes encompassed "improving and protecting the forest," including the conservation of forest waters, is clear from many of the comments during the floor debates on the amendment. Senator Warren, one of the sponsors of the Pettigrew Amendment, stated that the purposes of creating forest reserves included "conservation and retention of the waters" in the forests, and continued (30 Cong. Rec. 913 (1897)):

For what purpose do we lay out forest reserves unless it is for the preservation of forests; and if through such preservation we do not provide for the conservation and retention of the waters, etc., then do we not utterly fail in the very object we seek in laying out such reservations? I maintain that with the adoption of the amendment which is now offered very much is done toward providing for the protection of forests on the reservation when finally made, though not enough, it is true.

Senator Warren added that the major peril to forests was in their "neglect" (*ibid.*). The creation of national forests, he concluded, would provide a means of curing that problem (*id.* at 914):

These great fires are sometimes set * * * to drive the game out from the forests into the open where it can be more easily captured, and such fires are also started through carelessness about putting out camp fires, or from the pipe

or cigar of the smoker; but through whatever cause started, the ravages of fire can be greatly lessened by proper policing of the forest districts.

So I beg that no point of order may lie against [the Pettigrew Amendment], and that we may decide upon some provision, either the whole amendment or a portion of it, and pass it, to the end that we may have proper forest reservations, and having them we may also have some way of protecting them.

Senator Pettigrew himself emphasized the importance of protecting the forests, noting that under his amendment the Secretary of the Interior would have broad regulatory authority to fashion "a system of forestry administration" to protect the forests of the West and "keep them in a condition as good as they are now" (30 Cong. Rec. 913 (1897)).

The legislative background thus underscores the statutory language. The mandate "to improve and protect the forests" subtended the purposes of conservation and prevention of fire and erosion. Since minimum natural flows in forest streams are necessary to accomplish these purposes, it must be inferred that the government intended to reserve unappropriated water sufficient to maintain such flows when the forests were withdrawn from the public domain. *Cappaert v. United States*, *supra*, 426 U.S. at 139. Any other conclusion would disregard Congress' determination to protect and preserve "these great bounties of nature" (30 Cong. Rec. 915 (1897) (Sen. Gray)).

B. MAINTENANCE OF MINIMUM INSTREAM FLOWS ALSO FALLS WITHIN THE STATUTORY PURPOSE OF SECURING FAVORABLE CONDITIONS OF WATER FLOWS

In addition to satisfying the statutory purpose of protecting and improving the forest, maintenance of minimum instream flows is squarely within the second purpose stated in the Organic Act: "securing favorable conditions of water flows." The New Mexico Supreme Court gave no reason for its ruling to the contrary.

A distinctly unfavorable "condition of water flows" would be no water flow at all. Yet under the New Mexico Supreme Court's decision, the United States has no reserved right to ensure any flow of the streams in the national forests. If the state law of prior appropriation allows upstream appropriators to withdraw the full contents of the stream, the United States has no ground for protest against the dry bed running through the national forest. It can only resort to eminent domain and buy the stream back.

The statutory purpose of "securing favorable conditions of water flows" is defeated if the national forest has no reserved right to maintain any flow at all. And, as in the case of the "improve and protect" clause, the legislative history provides direct support for the natural reading of the statutory language.

From the legislative history of the Organic Act, it is clear that the Fifty-Fifth Congress understood the beneficial effects of forested uplands in mitigating otherwise destructive fluctuations in stream flow. It

was known that forests naturally evened stream flows by restraining floods in wet periods and releasing moisture gradually into the mountain streams during dry months. The destructive effects of the wide fluctuations in stream flow that resulted when mountain-sides were denuded of their forests were well understood. Writing of the purposes of the Creative Act of 1891, Fernow emphasized the "purpose of preserving or equalizing waterflow in the streams" and preventing "formation of torrents and soil washing" (see p. 33, *supra*). The Interior Department, charged with carrying out the mandate of the 1891 Act, issued a "circular of instructions relating to timber reservations" shortly after the Creative Act was passed, which noted that in selecting lands for forest reservations:

it is of the first importance to reserve all public lands in mountainous and other regions which are covered with timber or undergrowth at the headwaters of rivers and along the banks of streams, creeks, and ravines, where such timber or undergrowth is the means provided by nature to absorb and check the mountain torrents and to prevent the sudden and rapid melting of the winter's snows and the resultant inundation of the valleys below, which destroy the agricultural and pasturage interests of communities and settlements in the lower portions of the country.

Department of the Interior, Circular to Special Agents of the General Land Office, dated May 15, 1891 (reproduced at 29 Cong. Rec. 2514 (1897)).

Similarly, during the debates on the Organic Act, Representative McRae stated (30 Cong. Rec. 966 (1897)):

Common sense and science, I think, will agree that the forest cover will hold both the rainfall and melting snow, so they will not rush to the streams in torrents in the spring and early summer. We all know that in a well-timbered country the water goes more gradually into the streams and gives a steadier flow, with fewer overflows and less low water.

* * * * *

If we can learn nothing from Italy, France, and countries of the Old World, let us turn to New England and other parts of our own beloved country and see the destruction in the frequent freshets, bursting dams, and shallow rivers. Let us, if possible, save the South and West from the same fate.

Other Congressmen echoed this concern for protecting the forests so as to "preserve their streams" (30 Cong. Rec. 981 (~~1870~~) (Rep. Lacey)) and to "increas[e] the flow" of those streams (30 Cong. Rec. 985 (1897) (Rep. Bell)). See also 30 Cong. Rec. 982 (1897) (Rep. Shafroth); 30 Cong. Rec. 1011 (1897) (Rep. DeVries). In the Senate, likewise, there was general acceptance of the effect of forested lands in preserving water and in preventing extremes of flooding and dryness. See 30 Cong. Rec. 915 (1897) (Sen. Gray); 30 Cong. 916 (1897) (Sen. Clark); 30 Cong. Rec. 917 (1897) (Sen. White).

1897

Congress thus could not have intended that the national forests could be artificially deprived of a minimum natural flow in the forest streams. It did not intend to authorize appropriation of forest streams to the point of interference with "favorable conditions of water flows," any more than it intended to authorize interference with the federal government's ability "to improve and protect the forest." The United States therefore has a reserved right to insist on some minimum level of instream flow through its national forests, consonant with these purposes.

IV. RECREATION AND STOCKWATERING ARE AMONG THE SECONDARY PURPOSES FOR WHICH THE GILA NATIONAL FOREST WAS CREATED

The entitlement of the United States to a reserved water right for recreational purposes of the Gila National Forest was not contested before the special master because of a concession made by New Mexico. In a brief filed on November 30, 1972, the State conceded that recreation was a valid purpose for the creation of a national forest under the Organic Act of 1897. New Mexico stated (A. 40):

An extremely technical argument could be made in order to establish that recreation was not a valid purpose for the creation of a national forest until the passage of the Multiple Use Sustained Yield Act of June 12, 1960. (74 Stat. 215.) We find the argument ill-advised and concede the above stated point to the extent such recreation is of a magnitude revealed in traditional and historical use.

Pursuant to this concession, the State submitted a proposed conclusion of law regarding recreational uses, which the special master adopted *verbatim* (A. 146, 184):

That among the uses to which the waters of the Mimbres System reserved for the Gila National Forest may properly be put are recreational uses incidental to hiking, fishing, camping and hunting.

The special master further concluded (A. 198):

That until the enactment of the Multiple Use-Sustained Yield Act on June 12, 1960 * * *, no Act of Congress authorized the use of waters in national forests for substantial recreational reservoirs, winter sports facilities, and other substantial works involving large consumptive uses.

In the state district court, New Mexico recanted its concession and objected to the conclusion in the master's report that the State itself had proposed. The State's contention before the district court was not only that large consumptive uses of water for recreational purposes were outside the valid original purposes of a national forest, but that the United States enjoyed no reserved water right in the Gila National Forest for any recreational use, even if the use was non-consumptive and incidental to such recreational activities as hiking or camping (A. 202-203, 221). The district court sustained the objection and adopted the State's new proposed conclusion of law, which read (A. 230):

That recreation is not among the purposes for which the above-described Gila National Forest lands were or could have been withdrawn from the public domain, and the United States has no reserved water rights in said forest for recreation.

On appeal, the New Mexico Supreme Court upheld this ban on any federal claim to reserved Mimbres water for recreational use. The court stated that recreational purposes were "not contemplated" among "the original purposes for which the Gila National Forest was created" (A. 241).

The claim of the United States to reserved water rights for stockwatering by Forest Service permittees was likewise given and then taken away by the State. At the hearing before the special master, testimony established that federal permittees had long been allowed to graze stock in the national forest and that they had traditionally used water from the Mimbres system to water the stock (A. 61-62, 114-115). The special master listed some 22 stockwatering uses of Mimbres water in the national forest, and characterized them as "national forest uses * * * made either by the United States or its permittees" (A. 192-193). The State again submitted a proposed conclusion of law (A. 146, 183-184), which the special master adopted *verbatim*. That conclusion read (A. 198):

That with respect to the above-listed uses in the Gila National Forest where the use has been made under permit of the United States Forest

Service and the permit requires that the use be undertaken in compliance with state law, the water rights arising therefrom should be adjudicated to the permittee and not to the United States. [Emphasis added.]

In the district court, the State again objected to its own conclusion. It now wanted the conclusion modified to require that *all* Forest Service permittees obtain individually an adjudication of their rights to such water (A. 221-222). The district court adopted the State's proposed modification (A. 230). The new conclusion meant that the United States could not freely transfer stockwatering rights among its permittees; rather, on any transfer of grazing rights, the new permittee would be forced to establish his own right under state law to use Mimbres water for his stock.

The New Mexico Supreme Court again affirmed. The court ruled that the United States had no reserved water right in the forest for stockwatering, and hence that the water rights for this purpose must be perfected individually by each permittee in accordance with the state law of prior appropriation (A. 241).

A. RECREATION IS ONE OF THE PURPOSES FOR WHICH THE NATIONAL FORESTS, AND THE GILA NATIONAL FOREST IN PARTICULAR, WERE CREATED

1. *The legislative and administrative background*

The legislative and administrative record, both before and after passage of the Organic Act of 1897, demonstrates that Congress and the Forest Service

have always contemplated that the national forests would be used for recreational purposes such as hunting, fishing, hiking, and tourism.

The recreational purposes of the national forest were articulated throughout the period in which the national forests were first established. The 1890 Act creating the first forest reservations in California, specifically authorized the Secretary of the Interior to permit "the erection of buildings for the accommodation of visitors" and "the construction of roads and paths" through the forest. In addition, it instructed him to provide against the wanton destruction of the fish and game inside the forest, and against their taking "for purposes of merchandise or profit," and to protect all the "natural curiosities, or wonders within such reservation, * * * in their natural condition." 26 Stat. 651; see p. 32, *supra*.

The Creative Act, passed the next year, said nothing about the purposes of the forest reservations, but Chief Forester B. E. Fernow, in his contemporary construction of the Act, noted that recreation was among its "[s]econdary objects":

Secondary objects, such as can and will be subserved at the same time with those first cited, are those of an aesthetic nature, namely, to preserve natural scenery, remarkable objects of interest, and to secure places of retreat for those in quest of health, recreation, and pleasure. * * * [Fernow, *Report of the Chief of the Division of Forestry for 1891* 224 (1892); see p. 33, *supra*.]

All the purposes of the Creative Act, Fernow noted, could be achieved by proper forest management through "[r]egulation of the occupancy and the use of the reservation" (*id.* at 226).¹⁶

The Organic Act, passed six years later, provided that no national forest was to be established except for the three stated purposes (30 Stat. 35, quoted at pp. 25-26, *supra*); that lands more valuable for minerals or agriculture "than for forest purposes" were not to be included (*ibid.*); and that the Secretary of the Interior was required to protect the reservations against "fire and depredations" and was authorized to make rules and regulations and establish service "to regulate their occupancy and use and to preserve the forests thereon from destruction" (*ibid.*). While it did disqualify lands more valuable for mining or agriculture, the Act did not narrow the purposes that national forests could be established to serve. Its insistence on the three stated purposes did not mean that a national forest could be established to serve only those purposes and no others; it meant that a national forest could not be established unless it served at least one of those purposes.¹⁷

¹⁶ The Department of the Interior circular setting out standards for administering the Act of 1891 also suggested that forest reservations could serve a variety of purposes. The circular noted that the Creative Act justified preservation of timber on public lands "for climatic, economic, or other public reasons." 29 Cong. Rec. 2515 (1897); see p. 38, *supra*.

¹⁷ Congress confirmed this policy and made it explicit in enacting the Multiple-Use Sustained-Yield Act of 1960. See pp. 53-56, *infra*.

Nothing in the Act or its legislative history indicated an intent to repudiate the supplemental purposes of the national forests, such as recreation, that were already recognized.¹⁸

To the contrary, the Act's first stated purpose, "to improve and protect the forest," was in accord with the "[s]econdary objects" noted in the Fernow Report: "to preserve natural scenery, remarkable objects of interest, and to secure places of retreat for those in quest of health, recreation, and pleasure." Moreover, in authorizing the Secretary to make rules and regulations and establish service to "insure the objects of [the national forests], namely, to regulate their occupancy and use * * *" (30 Stat. 35), the Act plainly contemplated purposes additional to water flow and

¹⁸ Although recreational uses of the national forests were not specifically mentioned in the debates on the Organic Act, there were several comments that reflected Congress's awareness that the national forests would have aesthetic as well as economic value. Thus, Senator White expressed regret that a particular area was not included in a forest reserve:

"In the State of California and also in the State of Nevada there is a tract of land near Lake Tahoe, a very remarkable tract of land because of the wonderful scenery which it possesses. There are a number of lakes, some twelve or thirteen altogether, one of them being, I suppose, perhaps 8,500 feet above the sea, and the country surrounding them is of a romantic and lovely description.

"It is a character of country that ought to be reserved for the people for all time. * * * [Yet] although every other tract of land, desirable and undesirable, which was suggested for a reservation was reserved, this piece of land, over which a reservation should manifestly have been extended, was left open in order that it might be gobbled up."

30 Cong. Rec. 917 (1897). See also 30 Cong. Rec. 916 (1897) (Sen. Gray).

timber supply, the only two recognized by the New Mexico Supreme Court.

Indeed, the authority given the Secretary by the Act echoed the statement of Chief Forester Fernow in 1891 that all the forest purposes he identified could be achieved through "[r]egulation of the occupancy and the use of the reservation" (see p. 33, *supra*). Fernow's view of the national forests as "places of retreat for those in quest of health, recreation, and pleasure" (see p. 33, *supra*)—which was early and notably true of the Gila National Forest¹⁹—was also echoed and approved by a provision of the Organic Act (16 U.S.C. 478) authorizing entry by "any person" on the national forests "for all proper and lawful purposes," provided that the visitor complied with the "rules and regulations covering such national forests."

Roughly contemporaneous materials evince a continuing administrative and legislative interest in recreational use of the national forests. Less than two years after the passage of the Organic Act, Congress authorized the Secretary to grant leases of land near:

* * * mineral, medicinal, or other springs, within any forest reserves established within the United States, or hereafter to be established, and where the public is accustomed or desires to frequent, for health or pleasure, for the purpose of erecting upon such leased ground sanitariums or hotels, to be opened for the reception of the public. [Act of February 28, 1899, 30 Stat. 908.]

¹⁹ Visits to the Gila Cliff Dwellings (made a national monument in 1907, 35 Stat. 2162) and Gila Hot Springs, both located in the Gila National Forest, predated establishment of the forest and

The same year, on March 3, 1899, in the Forest Service Appropriations Act (30 Stat. 1095), Congress provided for the protection of the fish and game resources of the forest reserves by directing that the "forest agents * * * shall in all ways that are practicable, aid in the enforcement of the laws of the State or Territory in which said Forest reservation is situated, in relation to the protection of fish and game."²⁰

The 1902 *Forest Reserve Manual* stated (p. 8):

All law-abiding people are permitted to travel in forest reserves for purposes of prospecting, surveying, to go to and from their own lands or claims, and for pleasure or recreation.

By 1905, the Forest Service's publication, *The Use of the National Forest Reserves*, reflected a variety of recreational purposes for the national forest system. Regulation 42 of that publication read:

Hotels, stores, mills, summer residences, and similar establishments will be allowed upon reserve lands wherever the demand is legitimate and consistent with the best interests of the reserve.

Similarly, the *Forest Service Atlas* for 1907 (p. 20) indicated that permits for boating, fish hatcheries,

continue to this day. In 1906, the Gila National Forest was visited by 108,700 persons. See *Gila National Forest Recreation Management Plan*, p. 3 (1964).

²⁰ In the ensuing years funds were appropriated in a number of other Acts for the protection and care of fish and game in the forest reserves. Department of Agriculture Appropriations Act of March 3, 1905, 33 Stat. 861, 873; June 30, 1906, 34 Stat. 669, 683; March 4, 1907, 34 Stat. 1256, 1269. In the March 4, 1907 Act, the Forest Service was further instructed to "care for fish and

hotels, hunting, charecoal pits, cabins, camping, resorts, and trout ponds in the national forests were routinely issued.

In the Appropriations Act of March 4, 1915 (38 Stat. 1101), Congress authorized the Secretary of Agriculture to "permit responsible persons or associations to use and occupy suitable spaces or portions of ground in the national forests for the construction of summer homes, hotels, stores, or other structures needed for recreation or public convenience." The Act was later amended to provide further that the Secretary should exercise this authority "in such manner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, or other aspects of the National Forests" 70 Stat. 708.

Finally, in 1918, the Forest Service issued a study entitled *Recreation Uses of the National Forests*. After noting that approximately two and a half million persons had entered the national forests during the summer of 1916 for "some kind of recreation" (*id.* at 24),²¹ the study stated that recreation "stands on a par" with the other three major uses of the national forests: timber production, watershed protection, and grazing (*id.* at 27). The study concluded with the observations that "[h]istorically it appears that National Forests were first created for purposes of recreation, and that this use is traditionally universal," and that "[a]ctually it appears that

game supplied to stock the national forests or the waters therein." 34 Stat. 1270.

²¹ As the study noted (*ibid.*), this total was based on a count of entries and probably counted many individuals more than once.

the National Forests of the United States have always been extensively used for recreation * * * (id. at 36).

As this brief survey shows, Congress was well aware of the recreational purposes that the national forests were serving from the time they were first established. In light of the repeated congressional recognition—and, indeed, promotion—of recreational uses of the national forest lands, the inference is strong that the federal government intended to reserve water rights sufficient to permit these uses to continue. For example, when Congress in 1899 authorized the leasing of national forest lands for hotels near warm springs and appropriated funds for fish and game conservation measures in the national forests (see pp. 47–48, *supra*), it contemplated recreational uses that required water. Presumably the government desired the necessary water to be available when the lands were withdrawn for national forests.

In sum, the legislation of the 1890's compels the conclusion that the government in establishing national forests intended to reserve water not only for the primary purposes of the forests but for the secondary purposes as well, including recreation. And this intent became more firmly established as the years passed. It was well established by 1899, 1905, 1907, 1908, and 1910, the dates of the five Presidential proclamations reserving tracts of land for inclusion in the Gila National Forest.²²

²² See p. 3 and note 2a, *supra*. The first of the proclamations came on March 2, 1899 (reprinted at 34 Stat. 3126). Two days before, on February 28, 1899, the President approved the Act of Congress authorizing the leasing of land near springs in national forests for resort hotels (30 Stat. 908; see p. 47, *supra*). One day

Even if the congressional intent were unclear from the legislative materials, the contemporaneous and consistent pattern of administrative practice under the legislation of the 1890's compels the inference that Congress intended the national forests to serve purposes beyond those specifically mentioned in the Organic Act. "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16. This is particularly so when the administrative practice "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408, quoted in *Udall v. Tallman*, 380 U.S. 1, 16. Such deference is even more justifiable if the consistent administrative practice has been accompanied, as here, by apparent congressional ratification in the form of implementing

later, on March 3, 1899, the President approved the Forest Service Appropriation Act directing forest agents to aid in the protection of fish and game in the national forests (30 Stat. 1095; see p. 48, *supra*). The contemporaneity of these actions illustrates that Congress contemplated recreational purposes for the national forests at the time that even the first reservation for the Gila National Forest was made. (With respect to warm springs, it is relevant that the Gila Hot Springs, located in the Gila National Forest—though not in the watershed of the Mimbres—were a well-known attraction predating the establishment of the Forest. This alone refutes the holding of the New Mexico Supreme Court (A. 241) that "[r]ecreational purposes * * * were not contemplated" for this Forest.)

enactments consistent with the administrative interpretation. *Saxe v. Bustos*, 419 U.S. 65, 74; *Skidmore v. Swift & Co.*, 323 U.S. 134, 140; *Massachusetts Trustees v. United States*, 377 U.S. 235, 241; *United States v. Zucca*, 351 U.S. 91, 96.

2. *The state supreme court's "use"-“purpose” distinction*

The New Mexico Supreme Court dismissed the claim of the United States to reserved Mimbres water for recreational purposes by asserting a distinction between the “uses” and the “purposes” of national forests, pointing out that if mere “uses” such as recreation conflicted with the “purposes” set out in the Organic Act, “those secondary uses would not be permitted to continue” (A. 238-239). While it is true that recreational uses of the forest could never properly take precedence over the primary purposes of improving and protecting the forest, securing favorable conditions of water flows, and furnishing a continuous supply of timber, it does not follow that recreational uses were not intended as secondary purposes when the withdrawal of national forests was authorized.

The “use”-“purpose” distinction obscures the basic question whether Congress envisioned the role of the national forests as including recreation and whether water was therefore implicitly reserved for that purpose. In this case, as the legislative and historical materials demonstrate, the “uses” of national forests for recreation were known to Congress throughout the pe-

riod in which the national forests were authorized and created. Moreover, the evidence indicates that Congress intended that the national forests be used for these purposes, along with the primary purposes set out in the Organic Act.

This Court stated in *Cappaert v. United States*, *supra*, 426 U.S. at 139, that “when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation.” There is no reason to suppose that the Court meant to limit the reserved water rights to the primary purposes of the reservation, foreclosing for lack of water all secondary purposes that were within the original contemplation.

3. *The Multiple-Use Sustained-Yield Act of 1960*

In the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528 *et seq.*, Congress gave explicit recognition to the traditional use of national forests for outdoor recreation and other secondary purposes. The Act provides, in relevant part (16 U.S.C. 528):

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in [the Organic Act of 1897].

This Act confirmed and made explicit the policy recognized since passage of the Organic Act—that in order to justify the establishment of a national forest, at least one of the purposes expressly set out in the Organic Act had to be present, but that once that condition was met supplemental purposes were envisioned as well. Both the House and Senate Reports accompanying the 1960 Act made the point clearly:

[I]n any establishment of a national forest a purpose set out in the 1897 Act must be present but there may also exist one or more of the additional purposes listed in the bill. In other words, a national forest could not be established just for the purpose of outdoor recreation, range, or wildlife and fish purposes, but such purposes could be a reason for the establishment of the forest if there also were one or more of the purposes of improving and protecting the forest, securing favorable conditions of water flows, or to furnish a continuous supply of timber as set out in the 1897 act.

H.R. Rep. No. 1551, 86th Cong., 2d Sess. 4 (1960); S. Rep. No. 1407, 86th Cong., 2d Sess. 4 (1960).

The House and Senate Reports also made it clear that Congress did not mean to alter policy with the 1960 Act, but only to make explicit what had long been implicit in the statutory and administrative framework. The Reports noted:

The Act of June 4, 1897 (30 Stat. 35), refers both to watersheds and timber as purposes for which the national forests are established. Through the years by a number of con-

gressional enactments, including appropriations for carrying out specific activities and functions, through court decisions, and through policy directives and statements, the management of the national forests under the principle of multiple use has been thoroughly recognized and accepted.

H.R. Rep. No. 1551, *supra*, at 2-3; S. Rep. No. 1407, *supra*, at 3. Enactment of the 1960 bill, the Reports stated, "would continue this policy." *Ibid*.

The New Mexico Supreme Court concluded that the Multiple-Use Sustained-Yield Act of 1960 "can just as easily be interpreted" in a contrary fashion (A. 240). By the court's reading, Congress in the 1960 Act must have been devising new purposes for the national forests, else it would not have called these purposes "supplemental" (*ibid.*). This view is inconsistent with the legislative history of the Act, which states the congressional intent to continue longstanding policy. Moreover, it ignores the fact that two of the "supplemental" purposes of national forests stated in the 1960 Act are "timber" and "watershed" (16 U.S.C. 528, quoted at p. 53, *supra*). Since these purposes are also encompassed in the Organic Act, no matter how narrowly that Act is read, the court's assumption that the "supplemental" purposes could not have been original purposes has no validity. The 1960 Act is more properly read as a statement of the whole range of specific purposes, both primary and secondary, that Congress considered to have tradi-

tionally been implicit in the legislative and administrative policies governing the national forest system.

4. *Substantial consumptive recreational use*

The special master, after concluding that the reserved waters of the Mimbres were available for "recreational uses incidental to hiking, fishing, camping and hunting," added in his Conclusion No. 12 that until the enactment of the Multiple-Use Sustained-Yield Act of 1960, Congress had not authorized the use of water in national forests for "substantial recreational reservoirs, winter sports facilities, and other such substantial works involving large consumptive uses" (A. 198). The United States objected to Conclusion No. 12 on two grounds: that it assumed that the 1960 Act had altered legislative policy with regard to the purposes of the national forests; and that the conclusion was premature, since the United States did not have any substantial impoundments of water in the Mimbres watershed and had no present intention to impound or use substantial amounts of Mimbres water for recreational purposes in the future (A. 151-152). Since the state district court held that the United States had no reserved right to use water of the Mimbres for any recreational purpose, the special master's Conclusion No. 12 became superfluous and was omitted from the court's decision.

Because the New Mexico Supreme Court affirmed the district court's conclusion denying a reserved right for any recreational use, the only question before this Court concerning recreation is whether the United

States is entitled to any reserved waters for recreational purposes. Nonetheless, because the State has raised the spectre of large consumptive recreational uses, we note that the United States has not claimed and does not now claim reserved Mimbres water for such purposes. The recreational claims of the United States in this case are limited to modest water uses of the sort identified in the special master's Conclusion No. 11 (A. 198): "recreational uses incidental to hiking, fishing, camping and hunting" (see p. 41, *supra*).

B. THE NEW MEXICO SUPREME COURT ERRED BY DENYING THE UNITED STATES RESERVED WATER RIGHTS FOR THE PURPOSE OF STOCKWATERING

Livestock have grazed over the lands of the Gila National Forest since long before the National Forest was established. After the creation and expansion of the Forest around the turn of the century, the Forest Service began issuing grazing permits to ranchers, allowing them to use the Forest lands for grazing cattle on a controlled basis. At present, some 160 private ranchers are permitted under revocable permits to run some 29,000 cattle in the Gila National Forest. See United States Forest Service, *Men Who Matched the Mountains: The Forest Service in the Southwest* 204 (1972).

The Forest Service maintains watering facilities for livestock at selected points throughout the grazing areas of the Forest. To control the areas grazed and to prevent overgrazing, the Service opens different stockponds at different times in order to lure the stock to different areas of the forest as grazing con-

ditions vary (A. 85-88). See Forbes, *Forestry Handbook* 11.58 (1961); Roberts, *Hoof Prints on Forest Ranges* 104 (1963); see generally Frome, *The Forest Service* 55-57 (1971). In the past, the Forest Service has used water from the Mimbres to fill stockponds in the Forest. Because it has always been assumed that the United States had a reserved right to that water for this purpose, the Forest Service has been able to select its permittees, and to revoke their permits and select new ones if they violate the rules,²³ without having to contend with conflicting water-rights claims among past and present permittees.

By denying the United States any reserved water rights for stockwatering purposes, the New Mexico Supreme Court has disrupted the Forest Service's grazing control program. Under the state court's decision, if the Forest Service seeks to transfer a grazing permit from one rancher to another, it may not transfer watering rights along with the permission to graze. Instead, the new permittee may be faced with prior appropriation claims on the part of the former permittee and will be forced to establish his own right to the water, if he can, under state law.

The ruling of the New Mexico Supreme Court on the stockwatering issue was erroneous, both because grazing has been historically a secondary purpose of

²³ The grazing permit regulations of the Department of Agriculture specifically provide for revocation of permits for non-compliance with "the provisions or requirements in the grazing permit, the regulations of the Secretary of Agriculture on which the permit is based, or instructions issued by Forest Officers." 36 C.F.R. 231.6(a).

the national forests, and because requiring federal permittees to acquire individual water rights to water used by their stock on the national forests would place an unreasonable burden on federal range management and impair federal control of federal lands.

1. *Grazing has always been regarded as a secondary purpose of the Gila National Forest*

Whether stock would be permitted to graze on national forest land was a question of keen interest to the Congress that passed the Organic Act of 1897. Because the Creative Act of 1891 had made no provision for entry on forest lands for any purpose, national forest reservations created between 1891 and 1897 had been closed to grazing. During the debates over the Pettigrew Amendment, several congressmen commented on the hardship that this had produced among ranchers in the West. See 30 Cong. Rec. 1006 (1897) (Rep. Ellis); 30 Cong. Rec. 1011 (1897) (Rep. De Vries). See also, Roberts, *supra*, at 21-24.

In response to these concerns, Representative McRae expressed the hope that the forest management authority contained in the Pettigrew Amendment would be employed to put the national forests to the best possible uses, including controlled grazing. He stated (30 Cong. Rec. 966 (1897)):

The objects for which the forest reservations should be made are the protection of the forest growth against destruction by fire and ax, and preservation of forest conditions, upon which water conditions and water flow are dependent. The purpose, therefore, of this bill is to main-

tain favorable forest conditions, without excluding the use of these reservations for other purposes. They are not parks set aside for non-use, but have been established for economic reasons.

It is therefore necessary to prescribe the manner and method by which the timber growing thereon, the mineral contained therein, the water power furnished by them, and the pasturage within the same shall be used, so as not to injure or destroy the primary objects for which they were established.

In 1898, a survey of the forest reserves conducted pursuant to a provision of the Organic Act (30 Stat. 11, 34) focused closely on possible pasturage uses of the forests. *Surveys of Forest Reserves*, S. Doc. No. 189, 55th Cong., 2d Sess. 38-39, 48, 119-159 (1898). The survey appraised the effects of different livestock and the different pasturage conditions in various forest reserves, which would require different grazing programs. The survey concluded that "it is the regulation of pasturage within the reserves, not its prohibition, that is required if all their resources are to be rightly developed" (*id.* at 39). Controlled grazing was thus recognized as a legitimate purpose of a national forest under the Organic Act—a secondary purpose, to be sure, but a purpose that the Forest Service was expected to promote under its statutory authority to "regulate [the] occupancy and use" of the forests.

Administration of controlled grazing in the national forests was in effect by 1900. See Hibbard, *A History*

of the Public Land Policies 483-484 (1939). In the Gila National Forest (first established in 1899), as elsewhere, the supervisor issued grazing permits allowing limited grazing within the reservation "in order to equitably divide and save the grazing for future use." *Report of the Governor of New Mexico*, H.R. Doc. No. 5, 58th Cong., 2d Sess. 473 (1903). In *The Use of the National Forest Reserves* (1905), the Service stated that its policy in granting grazing permits was to "allow the use of the forage crop of the reserves as fully as the proper care and protection of the forests and the water supply permit." *Id.* at 20. In *United States v. Grimaud*, 220 U.S. 506, decided in 1911, this Court recognized that it was within the statutory authority of the Forest Service to regulate pasturage on the forests in a manner consistent with the primary objects set out in the Organic Act.

As in the case of recreation, the national forests have thus been used for controlled grazing throughout their history, and the Forest Service has traditionally made water available to its permittees as a means of facilitating and controlling the grazing use of the forest lands. This congressionally approved practice of running stock on the national forests under federal supervision compels the inference that the government intended, when establishing the forests, that sufficient water would be available to accommodate the practice and to enable the Forest Service to carry out its statutory mandate to regulate the occupancy and use of the forests.

2. *Requiring federal permittees to acquire individual rights to water used by their stock on national forest land would place an unreasonable burden on federal range management*

The New Mexico Supreme Court's ruling that the Forest Service permittees must acquire their own rights to the use of forest water for stockwatering purposes would impede federal range management on the national forests. If effective utilization of the forage resources of those forests is to continue, it is important that the control of forest waters used for grazing stock remain in the United States. As we have noted, the Forest Service relies on its ability to divert water into different stockwatering areas as a means of controlling the level and location of grazing in the Forest. In addition, its ability to transfer water use rights to new permittees facilitates the enforcement and effectiveness of its permit program. The imposition of state law requirements on stockwatering uses in the national forest could prevent the Forest Service from controlling those uses and interfere with the Service's ability to manage this national resource.

The Property Clause of the Constitution grants Congress the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." United States Constitution, Article IV, Section 3, clause 2. As this Court has held, the Property Clause accords to Congress "the power to determine what are 'needful' rules 'respecting' the public lands." *Kleppe v. New Mexico*, 426 U.S. 529, 539. *United States v. San Francisco*,

310 U.S. 16, 29-30; *United States v. Gratiot*, 14 Pet. 526, 537-538.

Proceeding under authority delegated by Congress,²⁴ the Department of Agriculture has exercised this federal power to regulate property rights on federal land by instituting its grazing permit program. The operation of that program is premised in part on the assumption that the United States has a reserved right to national forest water used for stockwatering, and that the permittees enjoy the use of that water only by virtue of their status as permittees. The contrary ruling of the New Mexico Supreme Court thus conflicts with measures long before taken by the United States to govern the disposition of property on federal lands.²⁵

²⁴ Congress delegated its power, under the Property Clause, to regulate the occupancy and use of the national forests to the Department of Agriculture. 16 U.S.C. 551. That delegation has repeatedly been approved, and the rules and regulations of the Department have been given the force of statute by the courts. *United States v. Grimaud*, 220 U.S. 506; *Light v. United States*, 220 U.S. 523; *United States v. Hyman*, 463 F. 2d 615 (C.A. 10); *McMichael v. United States*, 355 F. 2d 283 (C.A. 9).

²⁵ The intent of Congress to permit federal regulation that would govern the disposition of national forest water is indicated by 16 U.S.C. 481 (quoted at pp 29-30, *supra*), the provision of the Organic Act that deals with the acquisition of rights to use national forest waters. See Trelease, *Federal-State Relations in Water Law* 76-78 (1971). Although the section does not deal specifically with stockwatering, it evinces a congressional intention not to leave the disposition of national forest waters entirely to state law. Cf. *Federal Power Commission v. Oregon (Pelton Dam)*, 349 U.S. 435, 443-448; *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703.

CONCLUSION

The judgment of the New Mexico Supreme Court should be reversed.

Respectfully submitted.

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MARCH 1978.

APPENDIX

Section 24 of the Act of March 3, 1891, 26 Stat. 1095, 1103, 16 U.S.C. (1970 ed.) 471 (Creative Act) was repealed on October 21, 1976, by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. 94-579, 90 Stat. 2743, 2792. Prior to repeal, that Act provided:

That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

The Sundry Civil Expense Appropriations Act (or Organic Administration Act) of June 4, 1897, 30 Stat. 11, 34-36, 16 U.S.C. 473-482, 551, provides, in pertinent part:

[30 Stat. 34-35; 16 U.S.C. 475.] All public lands heretofore designated and reserved by the President of the United States under the provisions of the Act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said Act shall be as far as practicable controlled and administered with the following provisions:

(1A)

[30 Stat. 35; 16 U.S.C. 475.] No public forest reservation¹ shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein, or for agricultural purposes, than for forest purposes.

[30 Stat. 35; 16 U.S.C. 551.][²] The Secretary of the Interior³ shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; * * *.

¹ On March 4, 1907, Congress redesignated the "forest reservations" or "forest reserves" as "national forests." 34 Stat. 1269.

² On October 21, 1976, 16 U.S.C. 551 was one of the "statutes * * * repealed insofar as they apply to the issuance of rights-of-way over, upon, under and through * * * lands of the National Forest System * * *." Federal Land Policy and Management Act of 1976, Pub. L. 94-579, Section 706(a), 90 Stat. 2743, 2793. Section 706(b) of the same Act, 90 Stat. 2794, disclaims any intention to affect "the authority of the Secretary of Agriculture under" 16 U.S.C. 551 "except as it pertains to rights-of-way * * *." Issuance of rights-of-way in national forests is now governed by Section 501 of the 1976 Act, 90 Stat. 2776.

³ On February 1, 1905, Congress transferred control of the "forest reserves" from the Secretary of the Interior to the Secretary of Agriculture. 33 Stat. 628, 16 U.S.C. 472.

[30 Stat. 36; 16 U.S.C. 481.] All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

The Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528-531, as amended by Pub. L. 94-588, 90 Stat. 2949, 2962, provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. 475). Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the national forest lands or to affect the use or administration of Federal lands not within national forests.

SEC. 2. The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of this Act.

SEC. 3. In the effectuation of this Act the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests.

SEC. 4. As used in this Act, the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.

SEC. 5. This Act may be cited as the "Multiple-Use Sustained-Yield Act of 1960."